Hodgson Russ LLP
60 E. 42nd Street, 37th Floor
New York, NY 10165
Telephone: (212) 661-3535
Facsimile: (212) 972-1677
Garry M. Graber, Esq.
James C. Thoman, Esq. (*Pro Hac Vice* Motion Pending)

Attorneys for Finger Lakes Racing Association, Inc.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re NEW YORK OFF-TRACK BETTING CORPORATION, Debtor.	Chapter 9 Case No. 09-17121(MG)

OBJECTION TO MOTION OF DISTRICT COUNCIL 37, LOCAL 2021 FOR APPOINTMENT OF TRUSTEE PURSUANT TO SECTION 926(a) OF THE BANKRUPTCY CODE TO PURSUE CAUSES OF ACTION TO AVOID AND RECOVER FRAUDULENT TRANSFERS MADE TO NEW YORK RACING ASSOCIATION, YONKERS RACING CORPORATION, EMPIRE RESORTS, INC. MONTICELLO RACEWAY MANAGEMENT, INC., MONTICELLO RACEWAY, FINGER LAKES RACING ASSOCIATION, INC., DELAWARE NORTH COMPANIES, DELAWARE NORTH COMPANIES GAMING & ENTERTAINMENT, INC., VERNON DOWNS AND TIOGA DOWNS

Finger Lakes Racing Association, Inc. ("Finger Lakes"), by and through its undersigned counsel, submits this objection (the "Objection") to the above-referenced motion (the "Motion") filed by District Council 37, Local 2121 (the "Union") for the entry of an order appointing a trustee pursuant to Section 926(a) of the Bankruptcy Code to pursue causes of action to avoid and recover fraudulent transfers made to New York Racing Association, Yonkers Racing Corporation, Empire Resorts, Inc., Monticello Raceway Management, Inc., Monticello Raceway, Finger Lakes Racing Association, Inc., Delaware North Companies, Delaware North Companies Gaming & Entertainment, Inc., Vernon Downs and Tioga Downs. In support of its Objection to the Motion, Finger Lakes states as follows:

PRELIMINARY STATEMENT

1. The Union seeks to have a trustee appointed to recover statutorily mandated payments received by the Tracks[1]. The Union characterizes the statutory payments to the Tracks as "fraudulent transfers" recoverable pursuant to Sections 544(b)(1) and 548 of the Bankruptcy Code. As discussed in detail herein, these payments to the racetracks are statutorily mandated. These are not discretionary payments, but are mandatory under a statutory framework that requires the New York City Off-Track Betting Corporation (the "Debtor" or "NYCOTB") to pay money to the Tracks. This statutory framework has been in place for decades and is designed to compensate the racetracks which provide live racing in New York State for the loss of revenue when the regional off-track betting entities (collectively, the "OTB's") simulcast and accept wagers on out of state races. When OTB's offerings were expanded to permit the OTB's to simulcast out of state thoroughbred races and accepting wagers on such out of state races it diverted patrons, as well as betting handle, away from the Tracks. If NYCOTB did not pay these statutorily mandated payments, as a matter of state law, it could not engage in a major portion of its business. It has no discretion with respect to the payments.

2. Moreover, the Union's request to appoint a Trustee lacks support in both the law and the facts here. The Debtor filed a motion to dismiss its bankruptcy case on December 15, 2010 and a hearing will be held on the Debtor's dismissal motion on the same hearing date as the Union's Motion. Sections 903 and 904 of the Bankruptcy Code limit the Court's authority and jurisdiction to grant the Union's request for the appointment of a Trustee ,

1 "Tracks" shall refer to New York Racing Association, Yonkers Racing Corporation, Empire Resorts, Inc., Monticello Raceway Management, Inc., Monticello Raceway, Finger Lakes Racing Association, Inc., Vernon Downs and Tioga Downs. The Union inappropriately includes Delaware North Companies and Delaware North Companies Gaming & Entertainment, Inc., in the Motion.

given the expressed intention of New York State and its statutory creation, NYCOTB, to dismiss its bankruptcy case.

FACTUAL BACKGROUND

3. On December 3, 2009 (the "Petition Date"), the Debtor filed a voluntary petition (the "Petition") for relief under Chapter 9 of the Bankruptcy Code with the United States Bankruptcy Court for the Southern District of New York (the "Court").

4. The Debtor is a public benefit corporation created by New York Racing, Pari-Mutuel Wagering and Breeding Law (the "NY Racing Law") § 518. The Debtor operates an off-track pari-mutuel betting system through its OTB parlors, internet wagering and television racing channels. The Debtor accepts wagers on live horse racing events taking place at New York State tracks as well as tracks outside of New York State.

5. The enabling statute which created the OTB system, NY Racing Law § 518, specifically sets forth the mission statement and the Legislature's purpose in creating the OTB system for New York State. It states, in pertinent part:

> It is also the intention of this article to ensure that off-track betting is conducted in a manner compatible with the well-being of the horse racing and breeding industries in this state, which industries are and should continue to be major sources of revenue to state and local government and sources of employment for thousands of state residents.

6. Thus, it is the public policy of the State of New York that the OTB corporations in New York State are to foster and contribute to the well-being of the horse racing industry in New York State.

7. Finger Lakes owns and operates Finger Lakes Casino & Racetrack in Farmington, New York. Finger Lakes has been conducting live thoroughbred racing for 48 years and conducts live racing over 9 months of the year. It provides racing opportunities for a multitude of horsemen, including owners, trainers and jockeys in New York. It also supports many hundreds of other ancillary and related jobs connected to the racing and breeding industry, including, but not limited to, agriculture in New York State.

8. On May 24, 2010, Finger Lakes filed a Motion to Compel the Debtor, to immediately pay its outstanding post-petition obligations, comply with the statutory requirements of the NY Racing Law to fulfill the post-petition statutory distributions currently owed and pay all future post-petition distributions to Finger Lakes, pursuant to NY Racing Law § 1016, 11 U.S.C. §§ 105(a) and 503(b) and 28 U.S.C. § 959(b).

9. On August 5, 2010 the Court issued a Memorandum Opinion and Order Denying in Part and Abstaining in Part to Finger Lakes' Motion to Compel (the "Indirect Commission Opinion") (Docket No. 138). The Indirect Commission Opinion states that the Bankruptcy Court "is not the appropriate forum to resolve the state law issue of when the statutory payments must be made." This decision was based in part on the Court's conclusion that the issues involve "important legal and policy questions involving many stakeholders in the horse racing business in New York State, and not simply the concerns of OTB and the Tracks…" *See* Indirect Commission Opinion, Pg. 3.

STATUTORY PAYMENTS

10. When the OTB system was created in 1973, the OTBs were only permitted to simulcast and accept wagers on races held at New York State racetracks. In the

early 1990's, the OTBs, including the Debtor, lobbied the State Legislature to permit them to accept wagers on out-of-state thoroughbred tracks in order to increase their betting handle. In September of 1997, the New York State Legislature adopted Section 1017 of NY Racing Law (now Section 1016). Section 1016 permits the OTBs to simulcast and accept wagers on thoroughbred races conducted at tracks outside of New York State. The Legislature recognized that by permitting additional wagering to patrons of the OTBs on out-of-state races, the amount of wagering on New York State racetracks, including Finger Lakes, would be diminished since there were additional products being offered by the OTBs to their patrons. Because the simulcasting and wagering on out-of-state thoroughbred races is detrimental to the New York thoroughbred racetracks, including Finger Lakes, the statute provides for compensation (indirect commissions) to Finger Lakes from the OTB's.

11. To compensate the New York State tracks for the loss of betting dollars at OTBs on the New York State thoroughbred races, statutory formulas provide for payments to New York thoroughbred tracks (Finger Lakes and NYRA) based on wagers made at OTBs. *See* NY Racing Law §§ 1016(3) and 1016(4). The statutory payment scheme mandated by the NY Racing Law directs the Debtor to make certain distributions to the Tracks on each dollar wagered through NYC OTB's services on races held by Finger Lakes, as well as out-of-state thoroughbred races, prior to any funds being used to fund NYCOTB's operational expenses. This was acknowledged in the Debtor's first day pleadings. Finger Lakes and other creditors have asserted that the amounts to be remitted by the Debtor to the Tracks pursuant to NY Racing Law were not property of the Debtor, but rather money held in trust pending remittance to the Tracks.

12. For many years, Finger Lakes received statutory payments from the Debtor. However, at the time it filed its Petition, the Debtor had not made the statutory payments due to Finger Lakes for the six (6) months prior to the filing.

13. In *Suffolk Regional Off-Track Betting Corp. v. New York State Racing and Wagering Bd.*, five of the six regional OTBs challenged the indirect commissions that they were required to pay under state law. *Suffolk Regional Off-Track Betting Corp. v. New York State Racing and Wagering Bd. (In re Suffolk Regional Off-Track Betting Corp.)*, 900 N.E.2d 970, 972-73 (N.Y. 2008). Specifically, the OTBs challenged certain aspects of the "maintenance of effort" and "dark day" payments. The Court of Appeals thoroughly analyzed the legislature's intent in its initial authorization of the OTB's and subsequent adoption of indirect commissions. The Court explained that New York's creation of the regional OTB's was intended to curb illegal gambling, generate revenue for the support of government, and ensure "the well-being of the horse racing and breeding industries in this state, which industries are and should continue to be major sources of revenue to state and local governments and sources of employment for thousands of state residents." *Id.* at 971-72 (quoting McKinney's Racing, Pari-Mutuel Wagering and Breeding Law § 518 (2007)). Because the popularity of the OTBs depleted attendance at tracks and threatened their viability, the legislature passed a series of laws requiring the OTBs to pay a portion of their proceeds to regional harness tracks and nonprofit racing associations. As the legislature authorized the OTBs to broadcast more races, it consistently recognized the increased threat to the tracks and thus required the OTBs to pay commissions to the tracks in exchange for additional simulcasting rights. *Id.* at 972.

14. In reaching its decision, the Court of Appeals emphasized that indirect commission payments were established by the legislature to reimburse the Tracks for the very

real value conferred upon the OTBs to the Tracks' detriment. Not only did the OTBs receive significant benefits by gaining the ability to simulcast out-of-state and out-of-region races, but the indirect commissions were established to directly compensate the Tracks for loss of revenue that the legislature realized would occur when the OTBs were permitted to compete with the Tracks by simulcasting these races. *Id.* at 974, 976.

15. Moreover, NYCOTB would not have been able to simulcast out-of-state or out-of-region races if it had not made indirect commission payments in the years preceding the chapter 9 filing. In fact, the Racing Board prohibited NYCOTB from simulcasting out-of-state races after NYCOTB stopped making indirect commissions payments in March 2010.[2] Given the New York Court of Appeals decision and the actions of the Racing Board, there can be little doubt that OTB received substantial benefits in exchange for incurring the indirect commission payments.

16. In 2009, the Debtor's statutory payments due to Finger Lakes amounted to twenty percent of Finger Lakes' racing revenue, and twenty percent of Finger Lakes' purse account.

17. The establishment and operation of off-track wagering in New York is governed by a comprehensive regulatory scheme set forth in the NY Racing Law as described above. Under the NY Racing Law, the statutory distributions are mandatory.

OBJECTION

[2] A compromise was later reached whereby OTB agreed to escrow the indirect commissions in exchange for the right to continue simulcasting out-of-state races. *See In re New York City Off-Track Betting Corp.*, 434 B.R. at 136.

A. Delaware North Companies and Delaware North Companies Gaming & Entertainment, Inc., are not proper parties to the Motion.

18. The Union has improperly included Delaware North Companies ("DNC") and Delaware North Companies Gaming & Entertainment, Inc., ("DNCG&E") as parties to the Motion. DNC and DNCG&E have not received payments from NYCOTB. There is absolutely no factual basis for DNC and DNCG&E to be included as parties to the Motion. DNC and DNCG&E do not operate racetracks in New York State and are not entitled to payments, statutory or otherwise, from NYCOTB. Even if there was a basis to appoint a Trustee, which Finger Lakes strongly disputes, the Court should not approve any attempted recovery from DNC and DNCG&E.

B. Section 903 Prohibits the Union's Attempt to Appoint a Trustee:

19. Section 903 bars a Bankruptcy Court from avoiding obligations that the State mandated NYCOTB to incur, in an exercise of its control over the Debtor. Section 903 of the Bankruptcy Code provides:

> This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise, ...[3]

11 U.S.C. § 903.

[3] Section 903 contains the following two caveats, neither of which apply here: (1) "a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition" and (2) "a judgment entered under such a law may not bind a creditor that does not consent to such composition." 11 U.S.C. § 903.

20. Section 903 thus makes clear that nothing in chapter 9, including section 926(a), may limit or impair the State's power to control, through legislation, a municipality and its expenditures. Collier states that in drafting section 903:

> Congress intended to negate any inference that any other provision of chapter 9, or any other provision of the Bankruptcy Code made applicable in chapter 9, in any way interfered with a state's control over its municipalities. … It is now well settled that no provision of chapter 9 may limit or impair state control, and [section 903] carries out that constitutional rule.

See Collier on Bankruptcy, *supra*, ¶ 903.02[1].

21. For the Union to prevail, this Court must conclude that it has authority to set aside state legislative acts through the use of chapter 5 avoidance powers. The Union cites no authority and Finger Lakes is aware of none, for the exercise of such power in a proceeding under any chapter of the Bankruptcy Code. Moreover, section 903 expressly bars this Court from even considering the action with respect to a debtor operating under chapter 9.

22. The Union's request to appoint a trustee to avoid the commissions received by the Tracks before the bankruptcy filing must be denied as this Court's avoidance of such commissions would impair the State's ability to control the Debtor and the Debtor's expenditures in violation of Section 903.

C. Absent the Debtor's Consent, Section 904 Prohibits the Court from Granting the Union's Request:

23. Appointing a Trustee also would violate section 904 of the Bankruptcy Code and the Tenth Amendment. While section 926(a) permits the appointment of a trustee to pursue a particular avoidance action if the debtor refuses to do so, section 926(a) does not obviate the need for a debtor to consent pursuant to section 904. Section 904 limits section

926(a)'s application to the limited situation where the debtor chooses not to bring an avoidance action against a transferee, for political reasons or otherwise, but the debtor nonetheless must consent to a trustee bringing such an action on its behalf.

24. Section 904 of the Bankruptcy Code provides:

> **Notwithstanding any power of the court**, **unless the debtor consents** or the plan so provides, the court may not, by any stay, order or decree, in the case or otherwise, interfere with –
>
> ~~1.~~(1) any of the political or governmental powers of the debtor;
> ~~2.~~(2) any of the property or revenues of the debtor; or
> ~~3.~~(3) the debtor's use or enjoyment of any income-producing property.

11 U.S.C. § 904 (emphasis added). Consistent with the Tenth Amendment, which provides that all powers not granted to the federal government nor prohibited to the states by the Constitution are reserved to the states or the people, section 904 limits federal intrusion upon states' rights. The purpose of section 904 is to "circumvent any possible Tenth Amendment objection to municipal bankruptcy legislation." *In re County of Orange*, 179 B.R. 195, 200 n.12 (Bankr. C.D. Cal. 1995). Section 904 expressly limits the federal court's power to interfere with the debtor's property absent the debtor's consent. Collier on Bankruptcy, *supra*, ¶ 904.01. As Collier explains, section 904 supersedes any power granted to the Bankruptcy Court, including the power to appoint a trustee to bring avoidance actions pursuant to section 926(a) of the Bankruptcy Code:

> [W]hen the debtor has made a prepetition transfer in the exercise of its political or governmental functions, or in control of its income or property, the appointment by the court of a trustee to undo that transfer may constitute an interference with those powers or with that property, contrary to the mandatory dictates of section 904, which supersedes any power granted to the court under section 926(a).
>
> Thus, while the debtor is given the power through use of the avoiding power to undo some of the mishaps that may have befallen it by reason of aggressive

> creditor action on the debtor's slide into chapter 9, the court should be reluctant to appoint a trustee to take over for the debtor in exercising these powers.

Collier on Bankruptcy, *supra*, ¶ 926.02[1].

25. The Debtor has not consented to the appointment of a trustee to pursue fraudulent conveyance actions. Unless the Debtor affirmatively gives its consent, any attempt by a trustee to pursue fraudulent conveyance actions would violate section 904 of the Bankruptcy Code and the Tenth Amendment as such actions would interfere with the debtor's voluntary disposal of its property and revenues.

26. This Court has previously recognized the limits of its jurisdiction in its Indirect Commission Opinion, dated August 5, 2010. The Court abstained from considering whether the Debtor was required to make the statutorily mandated Indirect Commissions to the Tracks stating, in part:

> It is clear that the Racing and Wagering Board has the authority—and has taken recent steps—to resolve the issues on which the Court abstains. In the highly-regulated horse racing and pari-mutuel wagering businesses, this exercise of regulatory powers is wholly appropriate and should not be interfered with by a bankruptcy court. This appears to [be] an appropriate exercise of state police power, respected in all bankruptcy cases, and especially appropriate in a chapter 9 case.

Indirect Commission Opinion, Pg. 31. The Court further stated "[a]ny interpretation this Court would make would also disrupt the New York Legislature's intent to have the Racing and Wagering Board create a coherent policy regarding horse racing and betting issues in the state." *Id.* at 41.

D. The Union will not be Prejudiced if the Case is Dismissed and the Motion is Denied:

27. Under section 349 of the Bankruptcy Code, the right to bring any avoidance claims that were originally held by creditors prior to the bankruptcy filing will revest

in such creditors upon dismissal of the bankruptcy case. 11 U.S.C. § 349. Accordingly, to the extent the Union had standing to pursue a state law fraudulent conveyance claim before the chapter 9 case, it will not be prejudiced by the dismissal of this case and may then pursue its rights in state court at its own expense.

JOINDER

28. In the interest of judicial economy, Finger Lakes will not repeat and restate the arguments advanced by similarly situated parties in response to the Motion. Finger Lakes joins and adopts all relevant arguments and authorities, as if fully stated herein, set forth in Yonkers Racing Corporation ("Yonkers"), New York Racing Association ("NYRA") as well as in all other objections filed by similarly situated parties as is they were set forth herein in their entirety. Finger Lakes reserves its right to supplement this Objection, including but not limited to providing documentary evidence.

WHEREFORE, for all the foregoing reasons, Finger Lakes respectfully requests that the Court deny the Union's Motion and for such other and further relief as the Court deems just and proper.

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HODGSON RUSS LLP

By: /s/ Garry M. Graber
Garry M. Graber
James C. Thoman
60 E. 42nd Street, 37th Floor
New York, New York 10165
Telephone: (212) 661-3535
Facsimile: (212) 972-1677

Attorneys for Finger Lakes Racing Association, Inc.